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Testimony from:
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In support of LB 636

Judiciary Committee

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Chairman Lathrop, Vice-Chair Pansing-Brooks, and members of the Judiciary Committee, my name is Alan Smith, and I am a senior fellow and Midwest director at the R Street Institute, which is a nonprofit, nonpartisan, public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government in many areas.

R Street has a robust criminal justice portfolio and staff who have extensively researched the utility, efficacy, expense and innovation around practices of cash bail.¹ We see room for improving the circumstances of pretrial detention for not only the accused, but also the government and the taxpayer in all of those areas as multiple jurisdictions around the nation modernize the system, which has been essentially unchanged for decades and has existed in some form for about 1,500 years.²

Increased citizen interest on the entire criminal justice system for the last several years has increasingly focused on the challenge of equalizing the dispensation of justice to defendants who represent a wide range of personal resources. As many as 60-75 percent of people incarcerated, depending on the study, are in pre-trial detention simply waiting for their cases to be heard.³ For those who cannot afford to pay for a commercial bail bond or those who will trash their personal finances if they do, either choice is hard on low-income defendants. Alternative approaches that also offer the opportunity to save taxpayers' money by preventing pretrial detention and needless financial harm to defendants have correspondingly been the lure for a full bipartisan approach. Moreover, since cash bail can allow dangerous defendants with resources to get back on the street, the public safety implications of relying on cash bail as a fair, reliable tool to reduce risks can also be a concern across the political spectrum.

We would all like to believe that pretrial detention is basically for those defendants who are likely to flee the jurisdiction or who might be motivated to harass witnesses or commit other crimes. Knowing that a huge number of them are simply poor people who cannot afford the increasing cost of cash bail puts the current judicial practices in a different light.⁴ To address the twin problems of too much taxpayer expense for detainment and diminished liberty for defendants for whom the presumption of innocence is still a constitutional guarantee, several cities and other jurisdictions have eliminated most or all cash

bail. The entire state of Illinois just last week enacted legislation to eliminate cash bail by 2023.⁵ The federal government effectively eliminated cash bail in 1984 with passage of the Bail Reform Act.⁶ Washington, D.C. has barely used a cash bail system since 1968. Eighty percent of accused persons are released on nonfinancial bail options and only 15 percent are detained. The pretrial services agency reports that last year, even though complicated by the COVID-19 pandemic, 91 percent of defendants made all scheduled court appearances during the pretrial period without being rearrested.⁷

Over several decades, the system has developed alternatives to cash payments for release prior to a trial. The simplest is a release on one's own recognizance, which allows release by signing a contract to appear in court when required. There are also releases to pretrial services agencies, where available, with differing levels of supervision and requirements. When aptly handed out, the conditions work to increase the chances that a defendant will show up in court without any new arrest, and may include email reminders, digital monitoring, passport surrender or asset freezing. An audit of an Iowa pretrial service program demonstrated not just increased safety and appearances in court, but a cost savings of \$15,393 per person who was not incarcerated in addition to reduced technical violations of the release conditions.⁸

After all, it is expensive to keep an accused person incarcerated. Estimates vary on what it costs to jail the detained accused awaiting disposition of their cases but five-year old information from Douglas County reveals a cost of \$83.40 per person, per day.⁹ The total cost in the nation, according to recent calculations by The PEW Charitable Trusts is likely to be \$15 to \$18.75 billion annually.¹⁰ There should also be a government motivation to allow individuals who are still presumed innocent to continue working, supporting and caring for their children, and more if there is a high likelihood that they will appear in court without further arrest or damage to the community. It is commonplace to lose a job or housing while waiting for a case to come up.

Not to mention, the inherent challenge of a criminal justice system is that it must not only be functional to deter unlawful activity, to punish wrongdoing and to promote rehabilitation so individuals who have committed crime rejoin our communities as productive members of society. It must also limit harm to the innocent and be perceived as fair to earn the "consent of the governed". If large portions of the citizenry do not believe that justice is the predominant outcome of the system, there will always be trouble around enforcement of the laws. Moreover, when perceptions reflect real miscarriages of justice, such as when there is a systemic difference between justice for the poor and the well off, our nation has violated its oath to "equal justice under the law."

Of course, there is no system of law enforcement that satisfies everybody, but increasingly public policy is able to be informed by immense collections of data on current practices and innovations by various jurisdictions.¹¹

Nebraska is to be congratulated for considering updating its statutes to reflect increased knowledge of the probable outcomes, to save taxpayers money for other needs and for recognizing the importance of appearance of fairness to all its citizens.

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- ¹ Lars Trautman, "Ending the American Bail Racket", *The American Conservative*, Oct. 4, 2018. <https://www.theamericanconservative.com/articles/ending-the-american-bail-racket-forever/>
- ² Timothy R Schnacke, "A Brief History of Bail", *The Judges Journal*, Vol 57, No. 3, Summer 2018, <https://supremecourt.ohio.gov/sites/PJRSummit/materials/bailHistory.pdf>
- ³ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative, March 24, 2020. <https://www.prisonpolicy.org/reports/pie2020.html>
- ⁴ Melissa Neal, "Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail," Justice Policy Institute, Sept. 11, 2012. <http://justicepolicy.org/research/4364>
- ⁵ Dan Petrella, "Gov. J. B Pritzker signs sweeping Illinois criminal justice overhaul, which will end cash bail starting in 2023," *Chicago Tribune*, Feb. 22, 2021. <https://www.chicagotribune.com/politics/ct-jb-pritzker-criminal-justice-bill-20210222-nw7lh3upy5aipap2odh7jaofke-story.html>
- ⁶ S.215, Bail Reform Act of 1984, 98th Congress. <https://www.congress.gov/bill/98th-congress/senate-bill/215>
- ⁷ Pretrial Services Agency for the District of Columbia, "PSA Performance Outcomes – FY 2016-2020," Court Services and Offender Supervision Agency, November 2020. <https://www.psa.gov/sites/default/files/Fact%20Sheet-PSA%20Performance%20Outcomes-FY2016-20.pdf>
- ⁸ Marie VanNostrand, "Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study," *Federal Probation*, Vol. 74, No. 3, (2010), https://www.uscourts.gov/sites/default/files/74_3_3_0.pdf
- ⁹ Christian Henrichson, et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, Vera Institute of Justice, May 2015. https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf
- ¹⁰ Lisa Valder, "Local Spending on Jails Tops \$25 Billion in Latest Nationwide Data, The Pew Charitable Trusts, Jan. 29, 2021. [https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-\\$25-billion-in-latest-nationwide-data](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data)
- ¹¹ *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, Justice Policy Institute, September 2012. <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>